U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a resource center. It seeks to employ the beneficiary permanently in the United States as a public information administrative assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 21, 2001. The proffered wage as stated on the Form ETA 750 is $10.50 per hour for a 35-hour week, which equals $19,110 per year.

With the petition, the petitioner submitted the petitioner's owner's unaudited personal financial statement, prepared by a financial advisor. That financial statement indicates that the petitioner's owner and her spouse have over $600,000 in assets. This office notes that 8 C.F.R. § 204.5(g)(2) states, "Evidence of [the petitioner's ability to pay the proffered wage] shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." The unaudited financial statement is not convincing evidence of the petitioner's ability to pay the proffered wage.

The petitioner also submitted a letter, dated April 18, 2002, from the Assistant Vice President of a bank branch stating the balance of the owner's account.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on November 15, 2002, requested additional evidence pertinent to that ability. The Service Center specifically requested the petitioner's 2000 and 2001 corporate tax returns, a copy of the Form W-2 Wage and Tax Statement of each of the petitioner's 2001 employees, and a copy of the petitioner's Form 941 Quarterly Tax Return for each of the quarters of 2002.

In response, the petitioner's owner submitted a letter, dated January 11, 2003, in which she stated that the petitioner had never previously had any employees, and therefore had no Form 941 Quarterly Returns or W-2 forms. Copies of the 2000 and 2001 Form 1040 joint individual income tax returns of the petitioner's owner and the owner's spouse accompanied that letter.

A Schedule C attached to the 2000 return shows that the petitioner is held as a sole proprietorship[1] and suffered a loss of $7,310 during that year. The Form 1040 shows that the adjusted gross income of the petitioner's owner and owner's spouse during that year, including the petitioner's loss, was $49,746. Because the priority date is March 21, 2001, however, information pertinent to the petitioner's finances during 2000 is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date or to any other matter at issue in this case.

The 2001 Schedule C shows that the petitioner returned a profit of $5,353 to its owner during that year. The Form 1040 shows that the adjusted gross income of the petitioner's owner and the owner's spouse during that year, including the petitioner's profit, was $9,751.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 5, 2003, denied the petition.

On appeal, the petitioner submits a statement that reads,

> Due to an oversight, evidence was not submitted that would have allowed a favorable decision. We respectfully request that you reconsider your decision with the additional evidence we have submitted with this letter. Note: the contract labor I hired in 2001 had exactly the same job description as the employee this petition is for.

With the appeal, the petitioner provided a letter, dated January 15, 2003, from a certified public accountant, stating, "Key financial ratios indicate that the [petitioner's] financial position and results of its operations for the year ending [sic] December 31, 2002 were sound." The petitioner also provided a letter from a financial service representative and an assistant vice president of Coastal Federal Credit Union stating that the petitioner's owner has been a customer of that credit union since June 2000, has a savings account, exceptional credit, and an open line of credit. That letter also states that a copy of the petitioner's owner's deed of trust is available. Further still, the petitioner provided a letter, dated October 16, 2001, from a

[1] Because the petitioner is a sole proprietorship, rather than a corporation, it does not have, and cannot provide, the requested corporate tax returns.

temporary employment agency stating that it had been unable to provide the petitioner with a full-time permanent employee.

The petitioner asserts that it has not previously had an employee, and that the amount shown on Schedule C, Line 26 as wages were paid to temporary contract workers. The petitioner further asserts that the beneficiary will replace those temporary workers, thus implying that the amount shown as wages represents a fund that was available to pay the proffered wage. As support for its assertions, the petitioner provides the letter from the temporary employment agency indicating that it was unable to provide a suitable permanent employee to the petitioner. That letter does not state the duties of the temporary employees previously provided. The petitioner has asserted, but not demonstrated, that the beneficiary would replace the contract labor.

The accountant's letter, submitted on appeal, is not convincing evidence of the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) permits the use of audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The letter submitted, however, is not a financial statement and is not audited. The conclusion of an accountant, absent the evidence from which it was drawn, is not convincing evidence of a petitioner's financial condition.

The petitioner's reliance on its owner's available credit is misplaced. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds,[2] rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Similarly, reliance on real estate the petitioner or the petitioner's owner may own is misplaced. The value of real estate is not sufficiently liquid to be readily available to pay wages. Further, funds that may be borrowed secured by the value of real estate would become a debt and, as was noted above, are not indices of a sustainable ability to pay the proffered wage.

The petitioner's reliance on bank balances is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported to be in the petitioner's owner's bank account somehow reflect additional available funds that were not reflected on their tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

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[2] Where, as in the instant case, the petitioner is a sole proprietorship, the petitioner may also show the ability to pay the proffered wage out of the income and assets of its owner.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The proffered wage is $19,110 per year. The priority date is March 21, 2001. During 2001, the petitioner paid the beneficiary no wages. At the end of that year, it returned a profit of $5,353, which amount is insufficient to pay the proffered wage.

The petitioner is a sole proprietorship. As such, consideration of the income and assets of the petitioner's owner is appropriate. During 2001, the petitioner's owner and the owner's spouse had an adjusted gross income of $9,751. That amount is insufficient to pay the proffered wage. The petitioner has produced no convincing evidence of any other funds available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.